

A **LEONG WAI CHOONG & ORS v. MAH GUAT ENG & ANOR**

COURT OF APPEAL, PUTRAJAYA
ZALEHA YUSOF JCA
YAACOB MD SAM JCA
LAU BEE LAN JCA

B [CIVIL APPEAL NO: W-02(NCVC)(A)-418-02-2018]
10 JULY 2020

C **LAND LAW:** *Title – Co-proprietorship – Undivided share – Co-proprietors sought termination of co-proprietorship – Whether contractual obligations could override register document of title – Whether parties applied to subdivide property – Whether co-proprietorship ought to be terminated following sour relationship between parties – National Land Code, ss. 89 & 206(3)*

D **CIVIL PROCEDURE:** *Res judicata – Applicability – Co-proprietors sought rental income derived from building in earlier suit – Suit dismissed – Co-proprietors commenced different suit to terminate co-proprietorship – Whether both suits dealt with same matters – Whether principle of res judicata applied*

E The present appeal concerned a piece of property held by one Thong Ah Chan ('deceased') as a sole proprietor. Before her passing, the deceased transferred her undivided share in her property to her four sons, LKH, LKT, LKF and LKW ('four siblings'). The four siblings constructed a four-storey building with a mezzanine floor on the property and later entered into an agreement ('1980 agreement') which provided that (i) they were the registered proprietors of the property and each of them shall be the registered owner of the building as follows: (a) LKH – the ground and mezzanine floors;
F (b) LKW – the first floor; (c) LKF – the second floor; and (d) LKT – the third floor; and (ii) all of them would pay whatever monies due to the Government in terms of quit rent, assessment and other outgoing in respect of the building 'according to their value of shares'. Following the demise of LKH, LKF and LKT, the appellants became the current co-proprietors,
G holding 25% of the undivided share in the property. The first appellant was the administrator of the estate of LKT and the second appellant was the executor of the estate of LKF. The first respondent was the widow and executor of the estate of LKH and the second respondent was their child. In 2006, the appellants had sued the respondents at the High Court, seeking
H payment of the $\frac{3}{4}$ rental collections in respect of the ground and mezzanine floors of the building received by the respondents ('2006 suit'). The 2006 suit was dismissed by the High Court and the decision was affirmed by the Court of Appeal. The appellants then proposed to the respondent to sell the property or, alternatively, the respondents to purchase the appellants' share
I of the property at a price to be mutually agreed by the parties. When there

was no response from the respondents, the appellants proceeded to file originating summons ('OS') at the High Court for, *inter alia*, a declaration that the parties' co-proprietorship be terminated and the property be sold at the market value and the proceeds be divided according to the shares held under the title by the appellants and the respondents. The High Court dismissed the OS. Hence, the present appeal. The issues that arose for adjudication were: (i) whether *res judicata* applied by virtue of the 2006 suit; and (ii) whether, by virtue of the 1980 agreement, the respondents could not be compelled to sell the property.

Held (allowing appeal with costs; granting order in terms of originating summons)

Per Zaleha Yusof JCA delivering the judgment of the court:

- (1) *Res judicata* did not apply. The 2006 suit was in respect of the rental income derived from the building. The OS, on the other hand, sought to terminate the co-proprietorship between the parties. Claim for payment of rental income and claim for termination of co-proprietorship between the parties were obviously two different matters. The decision in the 2006 suit had nothing to do with the termination of co-proprietorship of the property. (paras 12 & 13)
- (2) Even though the object of s. 206(3) of the National Land Code ('NLC') is to preserve contractual obligations, that does not mean that contractual obligations could override s. 89 of the NLC that the register document of title is conclusive evidence of proprietorship. From the register document of title and the issue document of title, it was clear that none of the parties had ever applied to subdivide the property. The property, as it was, remained as undivided share and the parties held them as co-proprietors. The High Court Judge's finding that the respondents acquired 'indefeasible right' to the ground and mezzanine floors of the property from the 1980 agreement contradicted the register document of title where the appellants and the respondents were registered as co-proprietors holding undivided share in the property and not the designated floors of the property. 'Ownership' in the 1980 agreement was on the floors of the building, not on the proprietorship of the property *ie* the land. Of course, under the NLC, the land would include the building. Therefore, by holding the property in undivided share, the appellants and the respondents were entitled to share the property as a whole and not the designated floors. (paras 16, 18 & 20)
- (3) Three out of the original co-proprietors had passed away. The present co-proprietors, the appellants and the respondents, were not on talking terms. The best way to end the deadlock between them was by terminating the co-proprietorship in the property. (para 22)

A Case(s) referred to:

Lee A Hong Iwn. Ishak Ismail & Satu Lagi [2018] 1 LNS 116 HC (refd)
Rabiah Lip & Ors v. Bukit Lenang Development Sdn Bhd & Other Appeals [2008] 3 CLJ 692 CA (refd)
Tong Hin Seong & Anor v. Yong Teik Seong [2003] 1 LNS 697 HC (refd)

B Legislation referred to:

National Land Code, ss. 89, 206(3)

Other source(s) referred to:

Judith Sihombing, *National Land Code A Commentary*, p 837

For the appellants - M/s Mah Weng Kwai & Assocs

C For the respondents - M/s Goik, Ramesh & Loo

[Editor's note: Appeal from High Court, Originating Summons No: WA-24NCVC-848-05-2017 (overruled).]

Reported by Najib Tamby

D JUDGMENT

Zaleha Yusof JCA:

E [1] This is an appeal against the decision of the High Court at Kuala Lumpur, in dismissing the appellants' originating summons ("OS") which sought for, *inter alia*, a declaration that the parties' co-proprietorship be terminated and the property be sold at the market value and the proceeds be divided according to the shares held under the title by the appellants and the respondents.

F [2] The proprietorship is in respect of a property held under the individual title of GRN 78294, Lot 832, Section 62 (formerly known as HS (D) 86349, PT No. 49, Section 62), in the Town and District of Kuala Lumpur, State of Wilayah Persekutuan bearing an address at No. 1, Lorong Brunei 2, Pudu, 55100 Wilayah Persekutuan Kuala Lumpur ("the property").

G [3] The property was originally registered under the name of the late Thong Ah Chan as a sole proprietor. However, before her passing, the late Thong Ah Chan had transferred her undivided share in the property to her four sons, Leong Kuen Hong @ Leong Kuen Ho ("LKH"), Leong Kuan Tan @ Leong Ah Koon ("LKT"), Leong Keng Fook ("LKF") and Leong Kuen Wai

H (LKW).

I [4] The four siblings had in 1977 decided to construct a four-storey building with a mezzanine floor on the property. Later, on 10 June 1980, they entered into an agreement ("1980 agreement") in which they acknowledged that they were the registered proprietors of the property and that each of them shall be the registered owner of the building as follows:

- (i) LKH – ground and mezzanine floors; A
- (ii) LKW – first floor;
- (iii) LKF – second floor; and
- (iv) LKT – third floor. B

[5] The 1980 agreement also provides that all of them agreed to pay whatever monies due to the Government in terms of quit rent, assessment and other outgoing in respect of the said building “according to their value of shares”.

[6] Except for LKW, who is the third appellant in this appeal, LKH, LKF and LKT had since passed on. Following their demise, the appellants became the current co-proprietors of the property, with the appellants holding 75% and the respondents holding 25% of the undivided share in the property. The first appellant is the administrator of the estate of LKT and the second appellant is the executor of the estate of LKF. While the first respondent is the widow and executor of the estate of LKH and the second respondent is their child. C D

[7] Prior to the filing of the OS, the appellants had proposed to the respondents to sell the property or alternatively the respondents to purchase the appellants’ share of the property at a price to be mutually agreed by the parties; by way of letters dated 25 May and 30 June 2016. As there was no response from the respondents, the appellants filed the OS. E

[8] As alluded to earlier, the High Court had dismissed the OS, hence the appeal before us. This court, upon hearing of the appeal had, by a majority decision, allowed the appeal. This grounds of judgment reflect the majority decision. In this grounds of judgment we shall explain why we allowed the appeal. F

Issues

- (i) whether *res judicata* applies; and
- (ii) whether by virtue of the 1980 agreement, the respondents cannot be compelled to sell the property. G

Decisions

(i) *Whether Res Judicata Applies*

[9] This issue arose as in 2006 the appellants had sued the respondents *via* Kuala Lumpur High Court Suit No. S4-22-1131-2006 (“2006 suit”) seeking payment of the $\frac{3}{4}$ rental collections in respect of the ground and the mezzanine floors of the building received by the respondents. The prayers sought by the appellants were reiterated in the appellants’ written submissions as follows: H I

- A 14. Maka, Plaintiff-Plaintiff memohon daripada Mahkamah yang Mulia ini terhadap Defendan-Defendan untuk Perintah dan Penghakiman seperti berikut:
- B (i) Satu deklarasi bahawa Plaintiff-Plaintiff sebagai pemilik berdaftar Hartanah yang dikenali sebagai No. H.S.(D) : 86349, No. Lot 49, Seksyen 62, Bandar Kuala Lumpur, Daerah Kuala Lumpur dan Negeri Wilayah Persekutuan, Kuala Lumpur yang beralamat pos di No. 1, Lorong Brunei, 55100 Pudu Kuala Lumpur berhak mendapatkan segala maklumat dan dokumen mengenai semua transaksi penyewaan hartanah tersebut daripada Defendan Pertama dan Defendan Kedua.
- C (ii) Satu injunksi bahawa Defendan Ketiga dan Defendan Keempat iaitu penyewa-penyewa Hartanah yang tersebut di atas, dihalang daripada membayar sewa bulanan secara terus kepada Defendan Pertama dan/atau Defendan Kedua dan satu injunksi untuk menyekat Defendan Pertama dan/atau Defendan Kedua daripada mengutip sewa bulanan daripada Defendan Ketiga dan Defendan Keempat.
- D (iii) Bahawa mulai tarikh Writ Saman ini, keseluruhan jumlah sewa setiap bulan yang akan dibayar oleh Defendan Ketiga dan Defendan Keempat kepada peguam Plaintiff-Plaintiff sebagai pemegang taruh (stakeholder) sehingga penyelesaian tuntutan ini.
- E (iv) Bahawa Defendan Pertama dan Defendan Kedua membayar kepada Plaintiff Pertama, Plaintiff Kedua dan Plaintiff Ketiga mengikut hak bahagian masing-masing jumlah RM540,000.00 iaitu $\frac{3}{4}$ daripada keseluruhan sewa yang dikutip dari Januari 2000 sehingga September 2006 bersama dengan faedah pada kadar 8% setahun ke atas jumlah RM540,000.00 tersebut yang dikira dari tarikh sewa dibayar oleh Defendan Ketiga dan Defendan Keempat kepada Defendan Pertama dan Defendan Kedua sehingga tarikh penyelesaian sepenuhnya.
- F (v) Defendan Pertama dan Defendan Kedua membayar Plaintiff-Plaintiff kos tindakan ini.
- G (vi) Plaintiff-Plaintiff adalah bebas untuk memohon arahan lanjut.
- (vii) Lain-lain Perintah atau arahan yang Mahkamah Yang Mulia ini anggap sesuai dan berpatutan.
- H [10] The 2006 suit was dismissed by the High Court and on appeal to the Court of Appeal, the Court of Appeal had also dismissed the appellants' appeal.
- [11] The Learned High Court Judge in her grounds of judgment of the OS had *inter alia* stated as follows:

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6.5. The issue on the validity and enforceability of the 1980 Agreement to parties (*sic*) dispute on their respective ownership of the building was fully resolved and determined by the judicial pronouncements of the High Court and the Court of Appeal respectively dated 31 July 2009 and 11 October 2011

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6.11. Thus, Plaintiffs present suit was found by the Court to be made *mala fide* and, constitute a blatant disregard and, disrespect for the law. By filing this present action, the Plaintiffs have disregarded the earlier judicial pronouncements and, attempted to re-litigate settled issue previously canvassed, deliberated and fully, (*sic*) judicially determined. Plaintiffs' (*sic*) present action is undoubtedly an abuse of the Court process and, *res judicata* given the involvement of similar parties, issues, (*sic*) reliefs and, causes of action and factual background.

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[12] With due respect to the learned High Court Judge, the 2006 suit was, as shown in the prayers as cited above, in respect of rental income derived from the building. Whereas the OS sought to terminate the co-proprietorship between the parties. Claim for payment of rental income and claim for termination of co-proprietorship between the parties are obviously two different matters. This court in the 2006 suit, as shown at p. 232 of the record of appeal had clearly ruled against the appellants on the ground that "there was an agreement as regards the collection and appropriation of rental by the respondent" (*sic*). Hence, the respondents were allowed to retain the rental income. The decision of this court in 2006 suit thus had nothing to do with termination of co-proprietorship of the property.

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[13] Hence, we agree with learned counsel for the appellants that *res judicata* does not apply.

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(ii) *Whether By Virtue Of The 1980 Agreement, The Respondents Cannot Be Compelled To Sell The Property*

[14] On this issue, the learned High Court Judge had in her grounds of judgment, stated the following:

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6.1.2. Plaintiffs (*sic*) present action attempted to terminate the co-proprietorship of the property which clearly was to apportion the sale proceeds to the detriment of Defendants rightful ownership entitlement for the entire Ground and Mezzanine Floors. Plaintiffs (*sic*) actions undisputedly was Plaintiffs' second bite of the cherry given Plaintiffs' hitherto failed attempt in their 2006 suit for the retention of rental proceeds.

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A 7.1. Based on the above grounds, the Court is in agreement with the Defendants that, in pursuant of Section 206 of the NLC, Defendants should not be deprive (*sic*) of it's (*sic*) indefeasible right over the Ground and Mezzanine Floors of the subject property as was intended and, agreed by the original co-proprietorship of the property in the 1980 Agreement.

B 7.2. The Defendants accordingly should not be compelled by a Court order, to sell a property against their will particularly as the underlying motive for the Plaintiff (*sic*) Originating Summons was, the apportionment of sale proceeds that exceeded and contradicted the express intent of the contracting parties in their 1980 Agreement.

C [15] Section 206 of the National Land Code provides as follows:

206 Need for proper instrument of dealing duly registered

(1) Subject to the following provisions of this section:

D (a) every dealing under this Act shall be effected by an instrument complying with the requirements of sections 207 to 212; and

(b) no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, until it has been registered under Part Eighteen.

E (2) ...

(3) Nothing in subsection (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein.

F [16] It was the respondents' submission that based on this court's decision in *Rabiah Lip & Ors v. Bukit Lenang Development Sdn Bhd & Other Appeals* [2008] 3 CLJ 692, the object of s. 206(3) is to preserve contractual obligations. We have no quarrel with this. However, it is our considered view, that does not mean that contractual obligations can override s. 89 of the National Land Code that the register document of title is conclusive evidence of proprietorship.

G [17] Even the appellants in *Rabiah Lip (supra)*, who used s. 206(3) to claim they had acquired an equitable interest over the land, failed, as this court found that they failed to establish that the transfer to the respondent was fraudulent. Still on sub-s. 206(3), we endorse learned counsel for the appellants' written submissions as follows:

H 52 The application of Section 206(3) of the NLC 1965 was explained in the LexisNexis Annotated Statutes of Malaysia as follows:

I 1. A contract, not perfected by registration in accordance with the terms of the National Land Code can result in an *in personam* remedy which is enforced by monetary compensation;

2. This type of contract has **no effect** on interest registered in the Land Registry; and A

3. It has only been inserted into the National Land Code to confirm that the approach of earlier legislation which denied contractual operation to an unregistered transaction was not the approach of the National Land Code. B

53 The scope of Section 206(3) of the NLC 1965 was discussed in depth by the learned author, SY Kok in his book “*The Torrens System and Equitable Principles*” as follows:

1. The legislative intent on the effect on the provision in Section 206(1) of the NLC 1965 is to prohibit any attempt to use an unregistered instrument to effect a transfer of an existing registered title or encumbrance, without complying with the statutory requirements to present an executed and registrable instrument to the State’s registering authority for registration. C

2. On the other hand, Section 206(3) of the NLC 1965 is a statutory preservation of the pre-registration contractual nature of an unregistered but yet executed and **registrable instrument** of dealing in Torrens system land. D

3. However, Section 206(3) does not act as a floodgate for the judiciary to unlock and, consequently, to flood the Torrens system with all sorts of unwanted and unwarranted equitable principles, which will positively undermine the conclusive Torrens register. E
(emphasis added)

[18] From the register document of title and the issue document of title it is clear that none of the parties had ever applied to subdivide the property. The property as it is remains as undivided shares and the parties hold them as co-proprietors. We therefore agreed with learned counsel for the appellants that the learned High Court Judge’s finding that the respondents acquired an “indefeasible right” to the ground and mezzanine floors of the property from the 1980 agreement contradicts the register document of title wherein the appellants and the respondents are registered as co-proprietors holding undivided share in the property and not designated floors of the property. “Ownership” in the 1980 agreement is on the floors of the building and not on the proprietorship of the property ie, the land. And of course under the National Land Code, the land will include the building. F
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[19] Judith Sihombing in her book *National Land Code A Commentary*, at p. 837 had explained the meaning of the holding of alienated land in undivided shares as follows: H

The holding of alienated land in “individual shares” means that the co-owner owns a share in the land of a particular quantum but that this share has not been cut off from the shares of his other co-owners. All the co-owners are entitled to share in the possession of the land and any profits associated with the use of the land, but at no time may an individual co-owner point to particular part of the land and identify that part as his. I

A [20] Hence, we were of the view that by virtue of the holding of the property in undivided share, the parties ie, the appellants as well as the respondents are entitled to share the said property as a whole and not the designated floors as found by the learned High Court Judge.

B [21] Based on the above, we were of the view that the learned High Court Judge had erred when she held that the respondents cannot be compelled to sell the property by virtue of the 1980 agreement. We agreed with the appellants that the 1980 agreement was merely a contractual arrangement entered between LKT, LKF, LKH and LKW to regulate outgoings and income derived from the property.

C **Conclusion**

D [22] Three out of four of the original co-proprietors had passed away. The present co-proprietors, the appellants and the respondents, according to learned counsel for the appellants are not on talking terms. We found the best way to end the deadlock between them is by terminating the co-proprietorship in the property. (See *Lee A Hong lwn. Ishak Ismail & Satu Lagi* [2018] 1 LNS 116; [2018] MLJU 99 and *Tong Hin Seong & Anor v. Yong Teik Seong* [2003] 1 LNS 697; [2003] 6 MLJ 38).

E [23] We agreed with learned counsel for the appellants that appellate intervention is warranted herein as the learned High Court Judge had erred in both law and fact when she disregarded the clear legislative intent in s. 89 of the National Land Code that information in the Land Registry shall be conclusive evidence of proprietorship under the Torrens system. Her Ladyship was also wrong to hold that *res judicata* applied in this case.

F [24] We therefore, by majority allowed this appeal with costs and the order of the High Court dated 25 January 2018 was therefore set aside. We granted order in terms of the OS dated 29 May 2017.

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